Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

B.D.S.D.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Texas violated Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution by refusing to conduct a statutorily mandated investigation into the potential sexual exploitation of Petitioner before adjudicating her as a juvenile delinquent for the offense of prostitution.

2. Whether the Texas Court of Appeals erroneously limited the scope of protection under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as applied to juvenile proceedings to the specific procedures at issue in *In re Gault* and *In re Winship*.

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Respondent:
The State of Texas

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[1] Because this Petition arises from a juvenile court proceeding, Petitioner will be identified only by an alias In addition, Petitioner's full name has been redacted from documents included in the appendix. *See* TEX. R. APP. P. 9 8(c)

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OPINION BELOW

The opinion of the Texas Court of Appeals for the Fourteenth District (App. 1a-20a) is reported at 289 S.W.3d 889. The orders of the Texas Supreme Court denying Petitioner's petition for review (App. 46a) and denying Petitioner's motion for rehearing (App. 47a) were not published. The 315th District Court of Harris County, Texas, did not issue an opinion but signed a Judgment/Order adjudicating Petitioner as having engaged in delinquent conduct for the offense of prostitution. (App. 37a-45a)

JURISDICTION

The Texas Court of Appeals for the Fourteenth District rendered its judgment and issued an opinion on June 18, 2009. (App. 1a-20a) The Texas Supreme Court denied Petitioner's petition for review on February 12, 2010. (App. 46a) The Texas Supreme Court denied Petitioner's timely motion for rehearing on May 7, 2010. (App. 47a) The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part as follows: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner, a sixteen-year old child, was arrested and charged as a juvenile with the offense of prostitution. Petitioner was transported to the Harris County, Texas, juvenile detention center, where she advised a juvenile probation officer that she had run away from her mother's home and, at that time, was living with an adult male whose name she chose not to disclose. (App. 2a) According to the Juvenile Probation Report prepared by the State of Texas, Petitioner had been on runaway status for "several months," was not currently enrolled in school, and reported having "no friends." In addition, the Harris County Intake Department reported making "[s]everal attempts" to contact Petitioner's mother that "have gone unanswered." During the initial detention hearing, and outside of Petitioner's presence, Petitioner's counsel raised the concern that, based on the State's report, no investigation had been made as to whether someone was causing Petitioner to commit prostitution, which could entitle her to immunity. (*See* 30a-31a) Rather than investigate the potential sexual exploitation of Petitioner by the unknown adult male with whom she was living, the State of Texas elected to proceed against the child as an offender on the charge of prostitution.

Instead of undergoing a public trial, Petitioner agreed to plead "true" before the Honorable Michael H. Schneider, Jr., District Judge of the 315th District Court, Harris County, Texas, and went before the trial court for punishment based on an agreed recommendation. Following Petitioner's plea, the trial court found that Petitioner had engaged in delinquent conduct and placed her on probation for one year.

(App. 37a-45a) On November 20, 2007, Petitioner filed an amended motion for new trial arguing, *inter alia*, that the State's adjudication of Petitioner for the offense of prostitution after refusing to investigate her potential exploitation violated her right to due process under the United States Constitution. (*See* App. 53a-59a) At a December 13, 2007 hearing on Petitioner's motion for new trial, counsel for Petitioner asked the State to investigate whether Petitioner was being "compelled"[2] to commit the act of prostitution and whether she may have been a victim of sexual exploitation. (*See* App. 23a-36a) On behalf of the State of Texas, the district attorney refused, arguing that "there is no mandate for the State to investigate. It is not the State's duty to investigate whether or not someone is compelled." (App. 32a) The State further insisted that Petitioner "may be perfectly happy where she is"—*i.e.*, incarcerated. (App. 28a) The district court denied Petitioner's motion for new trial but granted her permission to appeal. (App. 21a-22a)

On appeal, Petitioner argued that her adjudication without any investigation by the State of Texas as to whether she was caused by any means to commit prostitution violated her right to due process. (*See* App. 4a) The Texas Court of Appeals for the Fourteenth District affirmed the trial court's judgment and issued its opinion on June 18, 2009. (App. 1a-20a) The Texas Supreme Court denied the petition for

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[2] Under the Texas Penal Code, a person commits the offense of "compelling prostitution" if the person knowingly "causes by any means a child younger than 18 years to commit prostitution." TEX PENAL CODE § 43.05(a)(2). In other words, the offense of "compelling" prostitution does not require proof of force, threat, or fraud if it involves a child under 18.

review, and later denied Petitioner's motion for rehearing. (App. 46a, 47a)

REASONS FOR GRANTING THE WRIT

Petitioner, a sixteen-year-old girl, was prosecuted by the State of Texas for prostitution and treated as a juvenile offender without any investigation into the probability that she was a victim of sexual exploitation. Texas's actions violated its own law and Petitioner's right to the protections of constitutional due process. This case of apparent first impression will affect and clarify the scope of due process protections for thousands of juveniles and potential child victims of sexual exploitation being handled by state law enforcement officers and prosecutors. This case may impact "[b]etween one and one and a half million children [who] are runaway/thrown away each year," and who are vulnerable to sexual exploitation. Suzanne L. Tiapula & Allison Turkel, *Identifying The Victims of Human Trafficking*, 42 THE PROSECUTOR 10, 10 (April/May/June 2008).

I. The juvenile court adjudication of Petitioner for prostitution did not measure up to the essentials of due process and fair treatment because the State of Texas did not conduct any investigation into the potential sexual exploitation of Petitioner.

Despite the hybrid civil/criminal nature of a juvenile adjudication, the Constitution requires that the proceeding measure up to "the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30-31 (1967). The Due Process Clause of the Fourteenth Amendment entitles individuals to

protection against government action through both "substantive due process" and "procedural due process." *United States v. Solerno*, 481 U.S. 739, 746 (1987). At a minimum, due process requires that the State's actions be "consistent with the fundamental principles of liberty and justice." *Buchalter v. New York*, 319 U.S. 427, 429 (1943). In addressing Petitioner's due process challenge, the Court must consider the different policies that are relevant and applicable under Petitioner's circumstances. *See Lassiter v. Dep't of Social Servs. of Durham County*, 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

A. Texas had a statutory duty to investigate the circumstances surrounding Petitioner.

At the age of sixteen, Petitioner approached an undercover police officer on the streets of Houston and agreed to have sex for a fee. This fact pattern alone constitutes suspicion of child abuse under the Texas Family Code. *See* TEX. FAM. CODE § 261.001(1)(E) (defining "abuse" to include "sexual conduct harmful to a child's mental, emotional, or physical welfare"); *see also id.* § 101.003(a) (defining "child" as an unmarried person under eighteen). The State of Texas subsequently learned that Petitioner was a runaway and was living with an unidentified adult male. But despite these known facts, the district attorney refused to conduct any investigation into the possibility that Petitioner was being sexually exploited. To the contrary, the district attorney took the position that it

had no obligation to investigate: "[T]here is no duty for the State to investigate. It is not the State's duty to investigate whether or not someone is compelled."

The district attorney is wrong: Texas law mandates an investigation where there are facts creating a suspicion of abuse. Under the Texas Family Code, a person with knowledge of facts to support a belief that a child's physical or mental health or welfare has been adversely affected by abuse or neglect "shall immediately make a report," TEX. FAM. CODE § 261.101(a), and provide that report to "any local or state law enforcement agency" or other group specified by statute. *Id.* § 261.103(a); *see also In the Matter of B.W.*, 53 Tex. Sup. J. 854, 2010 Tex. LEXIS 446, at *19 (June 18, 2010). This reporting obligation applies "without exception," even to a person whose communications with the child may otherwise be privileged. TEX. FAM. CODE § 261.101(c). Moreover, failure to report such facts is a criminal offense. *Id.* § 261.109.

Law enforcement or another appropriate agency "*shall* make a prompt and thorough investigation of a report of child abuse." *Id.* § 261.301(a) (emphasis added). "The primary purpose of the investigation shall be the protection of the child." *Id.* § 261.301(d). The investigating authority is required to make several determinations, including "(1) the nature, extent, and cause of the abuse or neglect; (2) the identity of the person responsible for the abuse or neglect; . . . (4) an evaluation of the parents or person responsible for the care of the child; . . . (6) the relationship of the child to the persons responsible for the care, custody, or welfare of the child; and (7) all other pertinent data." *Id.* § 261.301(e); *see also B.W.*,

2010 Tex. LEXIS 446, at *19 (interpreting the Texas Family Code as requiring a law enforcement or other governmental agency in receipt of a report of suspected abuse to "conduct an investigation during which the investigating agency may take appropriate steps to provide for the child's temporary care and protection"). Here, Texas's failure to conduct such an investigation was not a mere oversight; the State affirmatively refused to do so.

B. The power to determine Petitioner's fate rests exclusively in the hands of the State of Texas.

Petitioner was adjudicated as a juvenile for the offense of prostitution as set forth in section 43.02 of the Texas Penal Code.[3] Texas's failure to first conduct an investigation as required by Texas law did more than prevent Petitioner from obtaining the protection to which she was entitled—it also precluded her from any opportunity to receive immunity from prosecution. The Texas Penal Code in effect at the time made it a criminal offense if a person "causes by any means a person younger than 17 years to commit prostitution." TEX. PENAL CODE § 43.05(a)(2).[4] The State need not show that the offender used force, threats, or fraud—the standard is simply whether he or she

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[3] Texas has generally adopted offenses under the Texas Penal Code into the Juvenile Justice Code, which applies to children between 10 and 16. *See* TEX. FAM. CODE § 51.03(a)(1) ("Delinquent conduct is . . . conduct, other than a traffic offense, that violates a penal law of this state . . . .").

[4] Texas amended section 43.05 in 2009 to change the child's maximum age from 17 to 18.

"causes by any means" the child to commit the act of prostitution. *Id.*; *see also Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no pet.). Texas provides further protection for the child (and further incentive to pursue the "compeller") by providing immunity to individuals engaged in prostitution in exchange for any evidence or testimony against those who promote or compel their conduct. *See* TEX. PENAL CODE § 43.06(b). However, the power to invoke this immunity rests entirely in the hands of the State. Section 43.06 affords no opportunity for the Petitioner to assert immunity. Texas has complete discretion over whom it will target.

Fundamental principles of liberty and justice require that, before proceeding against Petitioner, depriving her of liberty and stigmatizing her as a prostitute, the State must conduct some investigation into the possibility that someone was promoting or otherwise causing her "by any means" to commit prostitution. Texas is required to conduct such an investigation under the Texas Family Code, and an investigation is the only means by which Petitioner might avail herself of immunity from prosecution under the Texas Penal Code. The decision to proceed against Petitioner under a charge of prostitution without conducting the statutorily mandated investigation does not meet the essentials of due process and fair treatment. This Court should grant certiorari to correct Texas's erroneous determination of Petitioner's constitutional rights and to protect countless other children from a similar deprivation of their rights.

II. The Texas Court of Appeals erroneously limited its analysis of a juvenile's due process protections to the specific procedural protections at issue in *Gault* and *Winship*.

The Texas Court of Appeals failed to analyze whether Petitioner's adjudication without any investigation into her probable sexual exploitation and statutory immunity violated her right to due process. Instead, the lower court improperly limited the due process protections available to Petitioner to the specific procedural protections that were at issue in *Gault* and *In re Winship*, 397 U.S. 358 (1970). The lower court stated that "[u]nlike the juveniles in *In re Gault* and *In re Winship*, [Petitioner] does not allege, nor does the record reflect, that she was denied any of the applicable procedural safeguards that due process requires for adjudicating a juvenile." (App. 17a) In so doing, the lower court limited the scope of due process protection for juvenile proceedings to "proper notice of the charges, the right to counsel, the privilege against self-incrimination, . . . the right to confrontation," and proof "beyond a reasonable doubt." (*Id.*)

This Court did not limit the application of due process to only those specific procedural requirements. This Court expressly stated in *Gault*: "We do not in this opinion consider the impact of these constitutional provisions [the Fourteenth Amendment and the Bill of Rights] upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.'" *Gault*, 387 U.S. at 13. This Court could have limited due process to juveniles in the manner suggested by the lower court, but it did not. Instead, the Court pronounced that any juvenile court adjudication "must

measure up to the essentials of due process and fair treatment." *Id.* at 30-31. Petitioner's case presents the scenario that this Court envisioned when it extended an adult's constitutional protections to juveniles through the flexible vehicle of due process: "[T]he Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings." *Id.* at 13-14.

The lower court failed to address the intertwining effect of applicable Texas statutory provisions (the investigation requirement under the Texas Family Code and immunity from prosecution for prostitution under the Texas Penal Code) in determining if the State's adjudication of Petitioner, a sixteen-year-old child, afforded her the essentials of due process and fair treatment. First, unlike the situations in *Gault* and *Winship*, no applicable procedural safeguard afforded to adults needs to be extended to juveniles in this case. Petitioner's complaint is that the State failed to extend a safeguard that Texas law uniquely affords *children* engaged in the conduct at issue by defining such conduct as "abuse" of a child. Second, the lower court failed to recognize or address any of the interests at stake to determine whether Petitioner was denied the essentials of due process and fair treatment as a result of Texas's failure to conduct the statutorily required investigation. *See Lassiter*, 452 U.S. at 24-25. This Court should grant certiorari to clarify the extent of due process protections available for juveniles, consistent with its pronouncement in *Gault*.

III. Texas's approach to children engaged in acts of prostitution as approved by the lower court will likely impede national and international efforts against human trafficking.

Human trafficking and the sexual exploitation of children is a world crisis. Protection of victims of sexual exploitation is a priority both in this country and throughout the world:

> On December 3, 2005, the United States formally joined ninety-four other countries as an official party to the [U.N. Protocol], . . . a multilateral component of the worldwide effort to combat modern-day slavery. It seeks to prevent trafficking, protect victims, and promote antitrafficking cooperation among governments. Consistent with the U.N. Protocol, the United States and other governments have developed antitrafficking programs which include the so-called "Three P's": prosecution of traffickers through enhanced penalties and investigative priorities, protection of victims, and prevention of future trafficking.

Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP. L. 503, 503 (Spring 2006) (footnotes omitted).

In response to the growing problem of human trafficking, Congress passed the Trafficking Victims Protection Act of 2000 ("TVPA"). 22 U.S.C. §§ 7101-12. Among other things, the TVPA is designed to "provide protection and assistance for those who have been

trafficked, and strengthen prosecution and punishment of those responsible for trafficking." 146 CONG. REC. S7781 (2000) (statement of Sen. Wellstone). Although the TVPA generally makes assistance conditional on a person's assistance with the investigation and prosecution of those responsible for trafficking, there is no such condition on assistance if the victim is under the age of 18. *See* 22 U.S.C. § 7105(b)(1)(C). As one commentator notes, this provision is designed to counter "the issue of biased and insufficient grants of assistance that came from the prosecutor's discretion and level of interest in helping the victim." Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 255 (2008). Although the TVPA focuses on foreign-born children, it is inconceivable that the same protections are not available to children that are born in this country.

According to the Department of Health and Human Services, one of the biggest challenges to identifying victims of human trafficking is that law enforcement frequently views them first and foremost as criminals, not as victims:

> Another challenge to identifying victims is the lack of acknowledgment by some law enforcement and service providers that someone is a victim of trafficking. There were examples given of victims who were viewed first as undocumented, or illegal, immigrants and treated as criminals and subjected to deportation hearings. **In other cases, victims were viewed first as prostitutes and charged with solicitation and placed in jail**

> **or detention (even in cases involving minors). These cases serve to reinforce the message of traffickers that the victims will be treated as criminals if they come to the attention of authorities, buttresses the perception of victims that they are to blame, and enhances the power and control of traffickers over their victims.**

HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP'T OF HEALTH & HUM. SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD 3 (Jan. 2008) (emphasis added). Unfortunately, law enforcement's bias against viewing children engaged in the sex trade as victims rather than as offenders is still prevalent, as evidenced by Texas's actions in this case.

Human trafficking of children is a national crisis, and Houston, Texas, is a major hub of this activity. *See* HOUSE COMM. ON HUMAN SERVICES, Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg., R.S. (2009). These are lost children. Regular citizens—teachers, doctors, neighbors, etc.— are frequently unable to report this type of abuse because the children are being harbored from the reach of law-abiding society. It takes undercover officers to infiltrate this exploitative world in order to find them. It violates traditional notions of due process and fairness to suggest that a child is only entitled to an investigation if a report is made *to* law enforcement, but not if the information is obtained directly *by* law enforcement. The age of the child and the known facts control, not the method in which these facts are discovered. Without guidance from this Court, Texas's approach of presumptively viewing the child as an offender, not a victim, will likely prevail,

hampering the nationwide and worldwide effort to stop human trafficking.

PRAYER

Petitioner respectfully requests that the Court grant certiorari, consider this case on the merits, and answer the questions presented.

Respectfully submitted,

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APPENDIX A

THE STATE OF TEXAS
COURT OF APPEALS
In The Fourteenth Court of Appeals

NO. 14-07-01079-CV

[Filed June 18, 2009]

IN THE MATTER OF B.D.S.D.)
)

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2007-08059J

OPINION

Appellant was adjudicated as a juvenile for engaging in delinquent conduct by committing the offense of prostitution. In two issues, she challenges the adjudication of the offense, arguing (1) her right to due process was violated when the State failed to investigate whether she was "caused by any means to commit prostitution"; and (2) as a result of the State's failure to conduct such an investigation, adjudication of the offense "offends public policy notions that child victims of sexual exploitation must be protected." We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant, a sixteen-year-old girl, was alleged to have engaged in delinquent conduct by committing the offense of prostitution. At an adjudication hearing, the trial court reviewed a signed stipulation of evidence, in which appellant judicially confessed that she had knowingly agreed to engage in sexual conduct, namely sexual intercourse, for a fee. With an agreed recommendation from the State, appellant asked the trial court to accept the stipulation. The trial court made an affirmative finding that appellant had engaged in delinquent conduct by committing the offense of prostitution, that she was in need of rehabilitation, and that a disposition was required.

The State next offered, without objection, a juvenile probation report, outlining appellant's personal information and delinquent conduct. The report indicated that appellant had run away from her mother's home several months before the incident resulting in the charged offense and, at the time, lived with an adult male whose name appellant chose not to disclose. At the adjudication hearing, appellant stated that, after she ran away from home, she lived with two friends, an adult male and an adult female. Appellant stated that neither of these adults knew that she was engaging in prostitution. Appellant claimed that she does not take drugs but that she engages in prostitution for the money "to buy things" that she wants. The trial court accepted the State's recommendation and ordered appellant, among other things, to complete one year of probation and fifteen hours of community service. The trial court ordered

that appellant be placed in the custody of the Chief Juvenile Probation Officer.

Appellant filed a motion for new trial. In the motion, she asserted that evidence was raised at the adjudication hearing that would make appellant immune from prosecution under sections 43.05 and 43.06 of the Texas Penal Code, and therefore, the trial court's adjudication denied her due process and led to an absurd result. The trial court denied appellant's motion and granted her permission to appeal.

II. ISSUES AND ANALYSIS

Appellant does not dispute that she engaged in an act that constitutes the offense of prostitution. Rather, appellant argues that the Texas legislature's 1973 adoption of the Penal Code, as applied to juveniles in the Family Code,[1] evinces that the legislature "could not have intended prosecuting a child for prostitution"[2]

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[1] *See* TEX. FAM. CODE ANN. § 51.03(a)(1) (Vernon 2008) (stating that delinquent conduct is, among other things, conduct, other than a traffic offense, that violates a Texas penal law punishable by imprisonment or by confinement in jail); *see also* Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 1, sec. 51.03(a), 1973 Tex. Gen. Laws 1460, 1462 (amended 1987) (current version at TEX. FAM. CODE ANN. § 51.03(a)).

[2] We first note that appellant's argument is based on the false premise that she was "prosecuted" for a crime. Appellant was not prosecuted for committing a crime. *See* TEX. FAM. CODE ANN. § 51.13(a) ("Except as provided by Subsection (d), an order of adjudication or disposition in a proceeding under this title is not a conviction of a crime."); *In re B.W.*, 274 S.W.3d 179, 182 (Tex. App.—Houston [1st Dist.] 2008, pet filed) (involving similar argument that a juvenile appellant was "prosecuted" for

when, under section 22.021 of the Texas Penal Code, a child cannot consent to sexual conduct with an adult and, under sections 43.05 and 43.06 of the Texas Penal Code, "a person under 17 caused by any means to commit prostitution is immune from prosecution." Appellant presents the following two appellate issues and asks this court to reverse and remand the case "for disposition on an appropriate basis":

1. Whether adjudication for engaging in delinquent conduct violated appellant's right to due process when the State did not investigate whether she was caused by any means to commit prostitution.

2. Whether adjudication for engaging in delinquent conduct "offends public policy notions that child victims of sexual exploitation must be protected" when the State did not investigate whether she was caused by any means to commit prostitution.

We review issues of statutory construction de novo. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002); *In re Smith*, 260 S.W.3d 568, 572 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). In construing a statute, our objective is to determine and give effect to the legislative intent of the provision. *See Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). If possible, we must ascertain that intent from the language the legislature used in the statute and not look to extraneous matters for an intent the statute

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prostitution).

does not state. *Id.* If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997); *In re Smith*, 260 S.W.3d at 572. We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the legislature chose. *Id.*

III. ANALYSIS

Appellant complains that she was denied due process of law and that notions of public policy were offended when she was adjudicated for engaging in delinquent conduct without a State investigation into whether she was caused by any means to commit the offense of prostitution. She argues that the Texas legislature did not intend for children to be prosecuted for prostitution and refers this court to sections 22.021, 43.05, and 43.06 of the Texas Penal Code as evidence of the legislature's intent.[3]

Adjudication of a Juvenile who Engaged in Delinquent Conduct by Committing the Offense of Prostitution under Section 43.02 of the Texas Penal Code

Under the Texas Family Code, juvenile justice courts have jurisdiction over all cases involving delinquent conduct by a person who was a child at the

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[3] For the purposes of our analysis, we presume, without deciding, that appellant's arguments are not barred by her confession in the stipulation of evidence or by the trial court's adjudication of appellant based on this agreement.

time the person engaged in the conduct. TEX. FAM. CODE ANN. § 51.04(a) (Vernon 2008). A "child" is a person who is ten years of age or older and under seventeen years of age. *Id.* § 51.02(2) (Vernon 2009). Delinquent conduct is defined, among other things, as "conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail." *Id.* § 51.03(a)(1) (Vernon 2008).

A child may be found to have engaged in delinquent conduct only after an adjudication hearing. *Id.* § 54.03 (Vernon 2009). Upon finding that a child has engaged in delinquent conduct, a trial court may conduct a disposition hearing. *See id.* § 54.03(h). Disposition is akin to sentencing and "'is used to honor the non-criminal character of the [juvenile] proceedings.'" *In re K.T.*, 107 S.W.3d 65, 67 (Tex. App.—San Antonio 2003, no pet.) (quoting *In re C.S.*, 804 A.2d 307, 309 n.2 (D.C. 2002)). An order of adjudication or disposition of a child generally does not constitute a criminal conviction. *See* TEX. FAM. CODE ANN. § 51.13(a) (Vernon 2009).

Under section 43.02 of the Texas Penal Code,[4] entitled "Prostitution," a person commits the offense of prostitution if that person "knowingly . . . offers to engage, agrees to engage, or engages in sexual conduct for a fee." TEX. PENAL CODE ANN. § 43.02(a)(1) (Vernon 2003). The offense of prostitution is punishable by confinement in jail. *Id.* §§ 12.22(2), 43.02(a) (Vernon Supp. 2008). Therefore, after an adjudication hearing,

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[4] Unless otherwise specified, hereinafter all references to a "section" are to the Texas Penal Code.

a child who has committed the offense of prostitution may be found to have engaged in delinquent conduct, because prostitution is conduct, other than a traffic offense, that violates a section of the Texas Penal Code that is punishable by confinement in jail. *See* TEX. FAM. CODE ANN. §§ 51.03(a)(1), 54.03; TEX. PENAL CODE ANN. §§ 12.22(2), 43.02(a)(1).

Under the unambiguous language of section 43.02, a "person"[5] commits the offense of prostitution if that person "knowingly . . . offers to engage, agrees to engage, or engages in sexual conduct for a fee." TEX. PENAL CODE ANN. § 43.02(a); *see In re B.W.*, 274 S.W.3d 179, 182 (Tex. App.—Houston [1st Dist.] 2008, pet. filed) (providing that the legislature could have drafted section 43.02 so that it did not apply to every "person," but the legislature chose not to do so). By its very language, the statutory definition of "prostitution" in section 43.02 is not limited to conduct by adults. *See* TEX. PENAL CODE ANN. § 43.02(a) (providing that a "person" commits the offense of prostitution); *see also In re B.W.*, 274 S.W.3d at 185 (holding that a juvenile may be adjudicated for the engaging in delinquent conduct by committing the offense of prostitution). Because prostitution is punishable by confinement in jail under the Texas Penal Code, a child who has committed the offense of prostitution under section 43.02 of the Texas Penal Code may be found to have engaged in delinquent conduct. *See* TEX. FAM. CODE ANN. §§ 51.03(a)(1), 54.03; TEX. PENAL CODE ANN.

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[5] A "person" is defined in the Texas Penal Code as "an individual, corporation, or association." TEX. PENAL CODE ANN. § 1.07(38) (Vernon 2003).

§§ 12.22(2), 43.02(a)(1); *In re B.W.*, 274 S.W.3d at 181–82.

Under the Texas Family Code, appellant was a "child" both when she engaged in the delinquent conduct and at the adjudication hearing. *See* TEX. FAM. CODE ANN. § 51.02(2). Under the unambiguous language of the relevant statutes, appellant was a child eligible to be adjudicated for engaging in delinquent conduct by committing the offense of prostitution. *See* TEX. FAM. CODE ANN. § 51.03(a)(1); TEX. PENAL CODE ANN. § 43.02(a)(1); *In re B.W.*, 274 S.W.3d at 185. However, we next consider appellant's arguments that sections 43.05 and 43.06 of the Texas Penal Code signal a legislative intent to protect children from prosecution for prostitution by providing for the prosecution of the adults involved in the offense under section 43.05 and by granting immunity from prosecution under section 43.06.

The Offense of Compelling Prostitution under Section 43.05 of the Texas Penal Code

Appellant claims that the Texas legislature did not intend to prosecute juveniles for prostitution because, under section 43.05 of the Texas Penal Code, entitled "Compelling Prostitution," adult "exploiters" of prostitution are prosecuted, and children are protected from sexual exploitation and prosecution.

Under section 43.05, a person commits the offense of compelling prostitution if that person "knowingly (1) causes another by force, threat, or fraud to commit prostitution; or (2) causes by any means a person younger than 17 years to commit prostitution." TEX.

PENAL CODE ANN. § 43.05(a)(2) (Vernon 2003). As used in this statute, "prostitution" means "the offense defined in section 43.02." *Id.* § 43.01(2) (Vernon 2003). Under the unambiguous language of section 43.05, a person under the age of seventeen can commit the offense of prostitution. *See id.*, § 43.05(a)(2).

Appellant relies on *Waggoner v. State* and asserts that the Austin Court of Appeals "may have already recognized that the child cannot commit an act of prostitution." *See* 897 S.W.2d 510, 513 (Tex. App.—Austin 1995, no pet.). The Austin Court of Appeals in *Waggoner* interpreted the meaning of "causing" a child "by any means" to commit prostitution under subsection 43.05(a)(2). *See id.* at 512–13. However, the *Waggoner* court did not consider the juvenile's potential guilt when concluding evidence was sufficient to conclude the defendant committed the offense of compelling prostitution. *See id.*; *see also In re B.W.*, 274 S.W.3d at 183 (distinguishing *Waggoner* in response to similar argument). The *Waggoner* court did not address the issue of whether a child could commit an act of prostitution or engage in delinquent conduct by committing the offense of prostitution. *See id.* at 511–13.

The purpose of subsection 43.05(a)(2) is to protect children under the age of seventeen from being caused to commit the offense of prostitution.[6] See TEX. PENAL CODE ANN. § 43.05(a)(2); *In re B.W.*, 274 S.W.3d at 183. Although appellant correctly notes that public

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[6] Under section 43.05(a)(1), it is an offense to knowingly cause a person of any age by force, threat, or fraud to commit prostitution. *See* TEX. PENAL CODE ANN. § 43.05(a)(1).

policy is served by protecting juveniles from being caused by any means to commit prostitution as contemplated by section 43.05(a)(2), it is illogical to conclude that, because it is an offense to knowingly cause a person younger than seventeen years to commit prostitution, a person younger than seventeen years cannot commit prostitution. *See In re B.W.*, 279 S.W.3d at 183. This argument contradicts the plain meaning of section 43.05, and if accepted, would mean that a juvenile could engage in conduct constituting prostitution without fear of adjudication. *See id.*; *P.G. v. State*, 616 S.W.2d 635, 640–41 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.); *see also In re C.S.*, 591 N.Y.S.2d 691, 693 (N.Y. Fam. Ct. 1992) (providing that to allow juveniles to engage in delinquent conduct without fear of adjudication would "empower[] pimps to exploit children [by] knowing that they will not be long removed from the streets because the [f]amily [c]ourt lacks jurisdiction.").

In this case, appellant was adjudicated as an offender who engaged in delinquent conduct by committing the offense of prostitution under section 43.02; she was not adjudicated as a victim of sexual conduct. *See* TEX. PENAL CODE ANN. § 43.02; *see also In re B.W.*, 279 S.W.3d at 183 (responding to an argument that by beginning performance of the prostitution act, as agreed, appellant is protected by law as a victim such that her consent could not be used as a defense by the adult who "exploited" her). Section 43.05 does not protect a juvenile from adjudication for engaging in delinquent conduct by committing the offense of prostitution. *See* TEX. PENAL CODE ANN. § 43.05; *In re B.W.*, 279 S.W.3d at 183–84. Such an interpretation would contradict the plain meaning of the relevant statutes. *See* TEX. FAM. CODE ANN. § 51.03(a)(1); TEX.

PENAL CODE ANN. §§ 43.02, 43.05; *In re B.W.*, 274 S.W.3d at 185.

Juvenile's Offer or Agreement to Engage in Sexual Conduct

Appellant claims that under the Texas Penal Code, children cannot legally consent to sex and therefore the Texas legislature never intended that juveniles be prosecuted for prostitution. Appellant refers to section 22.021, in which the legislature defines the offense of aggravated sexual assault, and section 43.05, in which the legislature defines the offense of compelling prostitution, for support that a juvenile cannot consent to sexual conduct. Appellant specifically asserts, "[i]t does not make sense that a child's consent to sex under section 43.02, has legal effect, but a child's consent to sex under [sections] 22.021 and 43.05, has no legal effect."

Under section 22.021(a)(2), entitled "Aggravated Sexual Assault," a person commits the offense of aggravated sexual assault if that person intentionally or knowingly engages in one or more acts of sexual conduct with a "child." *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B) (Vernon 2003); *In re B.W.*, 274 S.W.3d at 182; *see also* TEX. PENAL CODE ANN. §§ 22.011(a)(2) (Vernon Supp. 2008) (defining sexual assault of a child). Under the Texas Penal Code, a "child" is considered "a person younger than 17 years of age who is not the spouse of the Actor." TEX. PENAL CODE ANN. §§ 22.011(c)(1), 22.021(b)(1) (Vernon Supp. 2008). As discussed above, under section 43.05, the offense of compelling prostitution prohibits a "person" from knowingly causing by any means "a person younger than 17 years to commit prostitution." *Id.* § 43.05.

Prostitution, as discussed above regarding section 43.02, occurs when a "person" knowingly "offers to engage, agrees to engage, or engages in sexual conduct for a fee." *Id.* § 43.02(a).

Under the unambiguous language of section 22.021 as well as section 22.011, entitled "Sexual Assault," a child's lack of consent is irrelevant to the determination of whether an accused is guilty of one of these offenses. *See id.* §§ 22.021, 22.011. Even if a child consents or agrees to the sexual activity in fact, such consent is not given consideration for an offense that does not require proof that the victim did not consent. *See May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996). A child's agreement or consent to engage in sexual contact or conduct with an adult is irrelevant to the adult's commission of the serious criminal offenses set forth in these sections of the Texas Penal Code. *See* TEX. PENAL CODE ANN. §§ 21.021, 22.011; *May*, 919 S.W.2d at 424. However, in none of these statutes did the Texas legislature state that a child cannot offer or agree to engage in sexual conduct with an adult. *See id.* §§ 21.021, 22.011. Under the plain meaning of the prostitution statute, a child under the age of seventeen can engage in the conduct described in the statute. *See id.* § 43.02(a)(1); *In re B.W.*, 274 S.W.3d at 185. We find no merit in appellant's argument that these statutes cannot be harmonized to give each of them effect.[7]

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[7] Although appellant refers the court to literature pertaining to the exploitation of children, appellant has cited no legal authority holding that a child under seventeen years of age cannot be adjudicated for engaging in delinquent conduct by committing the offense of prostitution.

Immunity of a Party to Prostitution under Section 43.06 of the Texas Penal Code

Appellant argues that under section 43.06(b) children are unequivocally immune from prosecution. Appellant has provided no case law applying this statute; however, she asserts that the legislative history of section 43.06 confirms the legislature's purported intent to protect children from sexual exploiters and prosecution.

Section 43.06 of the Texas Penal Code, entitled "Accomplice Witness; Testimony and Immunity," is set forth below:

> (a) A party to an offense under this subchapter may be required to furnish evidence or testify about the offense.
>
> (b) A party to an offense under this subchapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

TEX. PENAL CODE ANN. § 43.06 (Vernon 2003). Section 43.06 applies to a "party to an offense under this subchapter." *Id.* The subchapter, containing section 43.06, includes the following offenses: prostitution, promotion of prostitution, aggravated promotion of prostitution, and compelling prostitution. *See id.* §§ 43.02–.05. As discussed above, a "person"—an adult or a child—can commit the offense of prostitution. *See id.* § 43.02(a); *In re B.W.*, 274 S.W.3d at 182.

Under the unambiguous language of section 43.06, a "party" may be granted immunity if (1) that party is a "party to an offense," (2) the offense is included in the subchapter within which 43.06 is contained, and (3) the party was required to furnish evidence or testify about the offense. *See* TEX. PENAL CODE ANN. § 43.06(b); *In re B.W.*, 274 S.W.3d at 184. The plain language of section 43.06 does not provide that a child may not be adjudicated for engaging in delinquent conduct by committing the offense of prostitution. *See* TEX. PENAL CODE ANN. § 43.06(b); *In re B.W.*, 274 S.W.3d at 184. Although appellant advances argument that the main purpose of section 43.06 is to protect victimized children or child prostitutes, under its plain meaning, the statute protects from prosecution parties to prostitution, promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution who are required to furnish evidence or testify about the offense. TEX. PENAL CODE ANN. § 43.06(a). The offenses about which a party may be compelled to testify are offenses that could involve either child prostitutes or adult prostitutes. *See id.* §§ 43.06 (specifying a "party to an offense under this subchapter" receives immunity), 43.02(a)(2) (specifying a "person" commits the offense of prostitution).

Immunity under section 43.06 is triggered only when a party to prostitution, promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution is "required to furnish evidence or testify about the offense." *Id.* § 43.06(a). There is no evidence in our record that any adult with whom appellant was living committed an offense under section 43.05 by knowingly causing appellant to commit prostitution. Even if an adult with whom appellant was living had committed such an offense, appellant would have no

immunity under section 43.06 on those facts alone. *See In re B.W.*, 274 S.W.3d at 184 (providing that "section 43.06 was inapplicable because the juvenile appellant was not 'required to furnish evidence or testify'"). Unless appellant was required to furnish evidence or testify about this adult's conduct in knowingly causing appellant to commit prostitution, appellant would have no immunity under this statute. *See* TEX. PENAL CODE ANN. § 43.06. The record does not reflect that appellant was "required to furnish evidence or testify" as set forth in section 43.06. *See id.* § 43.06(b); *In re B.W.*, 274 S.W.3d at 184. Therefore, on the facts of this record, appellant is not immune from adjudication under section 43.06. *See In re B.W.*, 274 S.W.3d at 184.

The State's Purported Duty to Investigate

Appellant argues that the State has an obligation to enforce section 43.05 by investigating facts. According to appellant, the fact that she was a run-away juvenile, who lived with an adult male whose identity she did not want to disclose, triggered an affirmative duty on the part of the State to investigate whether appellant was caused by any means to commit the offense as specified in section 43.05. The State did not conduct such an investigation. Appellant claims that because the State did not investigate these facts, she was denied immunity under section 43.06, which, in turn, denied her due process and was contrary to public policy.[8]

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[8] As discussed above, we have determined that based on these facts appellant was not immune from prosecution under section 43 06.

Appellant refers this court to chapter 261 of the Texas Family Code, entitled "Investigation of Report of Child Abuse or Neglect," and claims that the "law requires reporting when any person believes that a child is being abused, neglected or exploited." Although appellant cites in general chapter 261 of the Texas Family Code for support that she claims affirmatively requires the State to investigate compulsion of prostitution, she does not cite any specific section within the Family Code for this proposition.[9] Appellant claims the "Legislature's mandate in section 43.05 [of the Texas Penal Code] is directed at the State and adults." For this proposition, appellant cites sections 261.001(1)(E) and 261.001(1)(G) of the Family Code. *See* TEX. FAM. CODE ANN. §§ 261.001(1)(E) (defining "abuse" as sexual conduct as defined in sections 22.021 and 22.011 of the Texas Penal Code), 261.001(1)(G) (Vernon 2008) (defining "abuse" as "compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01" of the Texas Penal Code). However, none of the Family Code provisions on which appellant relies mention anything about an investigation by the State. On the facts asserted by appellant, there is no indication that the undisclosed adult male engaged in conduct specified in section 43.05 of the Texas Penal Code to warrant any investigation—particularly in light of appellant's admission at the adjudication hearing, as reflected in the record, that neither the adult male nor the adult female with whom appellant lived knew she engaged in prostitution.

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[9] *See generally* TEX. FAM. CODE ANN. §§ 261.001–.410 (Vernon 2009).

Likewise, appellant has provided no legal authority[10] indicating that an investigation by the State was a procedural prerequisite under the Due Process Clause to seek adjudication against her. Appellant relies on *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d. 527 (1967), and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) for support that she was denied due process of law by the State's failure to investigate. In *In re Gault*, the United States Supreme Court held that a juvenile is entitled to proper notice of the charges, the right to counsel, the privilege against self-incrimination, and the right to confrontation in a juvenile-delinquency adjudication proceeding. *See* 387 U.S. at 33–34, 41, 55–56, 87 S. Ct. at 1446–47, 1451, 1458–59. In *In re Winship*, the high court held that the State must prove beyond a reasonable doubt that a juvenile committed an offense. *See* 397 U.S. at 368, 90 S. Ct. at 1075.

Unlike the juveniles in *In re Gault* and *In re Winship*, appellant does not allege, nor does the record reflect, that she was denied any of the applicable procedural safeguards that due process requires for adjudicating a juvenile who has been accused of engaging in delinquent conduct. *See In re B.W.*, 274 S.W.3d at 184 (distinguishing *In re Gault* and *In re*

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[10] Appellant claims that her living arrangements involving the undisclosed male adult are consistent with results shown in national studies and other literature identifying people who are in danger of being compelled to engage in prostitution and otherwise sexually exploited. Appellant refers this court to literature and studies that she claims recognize the "common threads linking exploited juvenile girls" to prostitution and argues that her circumstances raised similar red flags warranting the State's investigation of her as a victim.

Winship as to a similar argument with similar facts). Appellant has provided no legal authority indicating that the State, in seeking adjudication against her without first conducting an investigation, violated any substantive due process rights under the Due Process Clause or the Due Course of Law Clause. As to appellant's argument that notions of fair play and substantial justice demand that a juvenile should not carry the stigma of being prosecuted for prostitution, we note that the Supreme Court in *In re Winship* required the State to follow applicable procedural requirements in the adjudication of a juvenile's guilt. *See id.* (rejecting similar argument). The *Winship* court did not hold that the State may never subject a juvenile to the stigma of finding that a juvenile violated a criminal law. *See In re Winship*, 397 U.S. at 367, 90 S. Ct. at 1074 (providing that a juvenile's conduct may require judicial intervention, but the intervention cannot subject a child to the stigma of finding a child violated a criminal law based on insufficient proof); *see also In re B.W.*, 274 S.W.3d at 184 (distinguishing *Winship* on same basis). For these reasons, appellants arguments lack merit.

IV. CONCLUSION

Under the unambiguous language of section 43.02, a juvenile may be adjudicated for engaging in delinquent conduct by committing the offense of prostitution. *See* TEX. FAM. CODE ANN.§ 51.03(a)(1); TEX. PENAL CODE ANN. § 43.02(a); *In re B.W.*, 274 S.W.3d at 185. The State was not obligated to investigate whether an adult caused appellant by any means to commit prostitution. Furthermore, because appellant was not required to furnish evidence or testify about the offense, appellant was not immune

from prosecution. Based on the record and existing law, adjudication of appellant for engaging in delinquent conduct by committing the offense of prostitution did not violate due process of law or offend public policy. *See In re B.W.*, 274 S.W.3d at 185. Therefore, we overrule appellant's first and second issues, and we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Guzman, and Sullivan.

THE STATE OF TEXAS
COURT OF APPEALS
The Fourteenth Court of Appeals

NO. 14-07-01079-CV

[Filed June 18, 2009]

IN THE MATTER OF B.D.S.D.)
)

JUDGMENT

This cause, an appeal from the trial court's adjudication, signed October 2, 2007, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, B.D.S.D., to pay all costs incurred in this appeal. We further order this decision certified below for observance.

APPENDIX B

NO. 2007-08059J

[Filed November 20, 2007]

IN THE MATTER OF)
B. D. S.)
CHILD)
_____)

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
315TH JUDICIAL DISTRICT

ORDER ON B. D. S.
MOTION FOR NEW TRIAL

On 12/13/07 the Court considered B. D. S. Motion for New Trial, the response thereto, and the evidence adduced at the hearing, and enters the following findings:

IT IS ORDERED THAT B. D. S. Motion for a New Trial is:

_____ GRANTED

__x__ DENIED

IT IS FURTHER ORDERED that B. D. S. consent to the APPEAL the adjudication is:

x GRANTED

DENIED

SIGNED on: 12/13/07

/s/
PRESIDING JUDGE

APPENDIX C

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
315TH JUDICIAL DISTRICT

TRIAL COURT CAUSE NO. 2007-08059J

[Filed January 22, 2008]

IN THE MATTER)
OF)
B. D. S. D.)
)

APPELLATE COURT NO. 14-07-01079-cv
REPORTER'S RECORD
VOLUME 3 OF 3 VOLUMES
TRIAL COURT CAUSE NO. 2007-08059J

****

REPORTER'S RECORD

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On the 13th day of December, 2007, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable MICHAEL SCHNEIDER Judge, Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

ELIZA MADRIGAL, CSR (713) 222-4950

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REPORTER'S RECORD

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MS. ALLEN: Petition No. 2007-08059J. Ms. B S. D. had been adjudicated delinquent of the offense of prostitution. There is a motion for new trial. It is the State's contention that Respondent needs to be present during the hearing.

MS. JOHNSON: Your Honor, Respondent's counsel who has been appointed as the ad litem to represent her, I have also asked another attorney Mr. Jake Johnson to go with me.

I have talked to my client and informed her that I am standing here to represent her and raise legal issues on her behalf. I have asked her if she wants me to go forward and she has stated that she does.

However, I'm asking that she not be present for this motion for new trial because of the nature of legal argument that I'm going to represent. The argument

is that she has been charged with the offense and adjudicated of prostitution. However, under Section 43.05 --

MS. ALLEN: Wait a second. This is what I want her here for. She needs to be here.

MS. JOHNSON: But the issue that I'm raising is that she was not questioned as to whether or not she was being compelled. I don't want her to know that that is a legal issue because I don't want there to

[p.5]

be a suggestion that because she heard the legal issue somehow it's tainted any investigation or any information that she may provide the State.

THE COURT: Before we get to that. Do you have any kind of case law that would suggest that going forward in any juvenile proceeding without the Respondent actually being present?

MS. JOHNSON: I don't believe that she needs to be here because I'm the ad litem who is representing her. Because it's a motion for new trial and I'm not presenting evidence, necessarily testimony on her behalf, I'm representing the legal issue.

I'm objecting to her being here because of the nature of the argument and the fact that it is information -- don't want it to be suggested by the State that if she finds out that she is being compelled and she says that, it makes her immune.

Nobody has questioned her based on the report that indicates she was living with an adult male despite the fact she is a runaway. That is worthy of questioning why she may have been out prostituting, where the money she was making was going because she is not of the appropriate age to live or contract on her own.

So presumably, that is an adult which may need to be looked into. That investigation hasn't been done.

[p.6]

MS. ALLEN: My concern is, and I mean this respectfully. I think you are trying to do the absolute best, but being the ad litem and being an attorney in this situation is a huge conflict of interest. Because she is espousing a legal argument that she doesn't know is based in fact yet because she just said she doesn't know, there is evidence that the child was compelled. And she's saying that the child shouldn't be here. It's a huge conflict. I'm incredibly uncomfortable with that.

THE COURT: Where is the child right now?

MS. JOHNSON: Back in the holdover, Judge.

THE COURT: Does she have a -- is there a guardian that we have?

MS. JOHNSON: The report indicates that at the time she came in her parents were not involved. So I don't know of it. But akin to say that, somehow it is the State's responsibility to investigate. It's a mandate to them as to whether or not this child was being compelled. That investigation wasn't done. And it's the

State's responsibility. And if they find it, then the child is immune.

MS. ALLEN: That is not true. Okay. Now we're arguing motion for new trial. I want the child here. I feel incredibly uncomfortable proceeding without the child being here. We don't even know that she wants

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a new trial. She may be perfectly happy where she is.

MS. JOHNSON: She has stated to me in the presence of Mr. Johnson when I let her know I was raising legal issues on her behalf, which may or may not make this adjudication void. She stated, I don't want this to stick with me. I asked her if she wanted me to proceed and she said yes.

THE COURT: I would actually at this point agree that not only does she need to be here, but it's required that she have a guardian. I understand we're very much pressed for time here today. And although we're in the middle of another hearing I would certainly not have a problem entertaining this hearing with a guardian.

Is there some attorney we can have here to be appointed to be her guardian and take this up a little bit later maybe on a break or something?

I appreciate your patience on this. And I understand that you're pressed for time. Let's do that and on our next break. We will do so.

(Brief recess.)

THE COURT: All right. Back in the record and, Ms. Duer, you are?

MS. DUER: I'm the guardian ad litem for B. S. appointed by the Court.

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THE COURT: Have you had a chance to talk with your client?

MS. DUER: I have spoken with her and I would prefer that she not be present for this hearing also. I think it's in her best interest that she not be present, but I'll let the attorneys argue about why based upon what I understand the law to be in this situation.

I think it's in her best interest so that future testimony or evidence that may be elicited from her, or she doesn't hear why we're here and then twist that around to fit the situation. But I'll let them argue to you.

MS. ALLEN: I understand their contention that if B. S. hears that she if she was compelled she could be given immunity. That's their contention. They don't want her to hear that and then testify I was compelled or I wasn't compelled, whatever.

My issue is if they are asking for a new trial because she was compelled, they haven't presented any evidence that she was compelled. So it's a circular argument that they've got instead of going and talking to her about the facts that they are saying is the basis for new trial, they are just arguing that they might

exist so therefore we need to have a new trial. I find that goes against every modicum of justice.

[p.9]

MS. DUER: I would say that I'm not in the position to ask her those kinds of questions. That it would need to be an expert a psychologist or something like that who has dealt with those issues of prostitution and girls underage who have been sexually abused to ask those specific kind of questions.

And I don't think I'm the person to ask that. I'm one of these, cut to the chase and tell me what is going on. And that may not be the proper form or venue or way to do it. I think there should be a proper setting in which to ask her those questions.

THE COURT: You understand, it's my understanding, that today is the last day the Court would have jurisdiction to grant a new trial?

MS. JOHNSON: It's actually Saturday, but, yes, Judge, I would like to get it today to make sure things are in order. The respondent's attorney's position on this, I filed motion for new trial because I happen to be her counselor at the detention court hearing the day after this offense occurred she got brought in.

On reading the report and the fact that she was a runaway, that she was living with an adult male who she didn't want to give information about, the issue was raised to the State in front of Judge Malazzo and the prosecutor at the time.

[p.10]

There is a concern here and it is the State's obligation to protect this child, and it is the State's responsibility to investigate. This is not an affirmative defense. It is not the Respondent's obligation to provide the information to the State to give them immunity.

If the State investigates and if they find out the guy that you were living with may have been causing you by any means to commit prostitution, then this child should not be branded with label of prostitute simply because they did not investigate and the issue was raised despite the fact that it didn't mean to be by the Respondent.

That is the basis for the motion for new trial, which is what is the harm in getting this right before we actually come in here to prosecute her.

THE COURT: I think Ms. Allen's position is there is no evidence before the Court -- that there is no new evidence or it was not done correctly.

MS. JOHNSON: I don't know of any investigation done by the State and the legislature imposed on them in Section 43.05. They are the ones that are here to protect the children. If you are under 17, if you are caused by any means to commit prostitution, then that adult is subject to second degree felony. That

[p.11]

is the higher charge. That is the real target that the legislature wants them to go after.

The Department of Justice and the National Center for Missing and Exploited Children articles which are referenced in motion for new trial indicate that there is some level of suspicion when girls are runaways when there is some reference of a boyfriend or something like that, that that may be their pimp.

With that information to do nothing -- all they have is a page and a half -- to do nothing to question or find out if the child under 17 who they know agreed to sex for $50 as a fee, why? Was anybody benefitting? Who taught you that $50 is an appropriate fee for this?

None of those questions were asked. None of those questions have been answered. And that is a violation due process before giving her a conviction to not do our part as the State.

MS. ALLEN: First of all, while I appreciate her viewpoint, there is no mandate for the State to investigate. It is not the State's duty to investigate whether or not someone is compelled. If there is any evidence certainly, we should investigate. But the mere fact she was living with an adult male even though she was only six weeks away from being an adult herself.

[p.12]

MS. JOHNSON: Criminally 17.

MS. ALLEN: That is not a huge red flag. Twelve and living with adult male, that's a red flag. Sixteen and living with an adult mail who could be just 17 years old is not a red flag and does not raise any duty on the State.

The legislature states that a 16-year-old can consent to sex sometimes. It's not necessarily compelled depending on the age of the person they are having sex with. It can be an affirmative defense, and the statute itself assumes that a juvenile can commit prostitution. So there is no legal basis for this motion for new trial to be granted.

The statute itself says a person commits an offense if he knowingly causes by any means a person younger than 17 years of to commit prostitution. In and of itself that says a child younger than 17 can be a prostitute.

MS. JOHNSON: We disagree. The statute says 17 and under, not 12 or not what's the situation. The statute imposes the protection on anybody 17 and under and the Courts have reviewed this issue.

MS. ALLEN: It actually says younger than 17.

MS. JOHNSON: 364 days, 23 hours, 59

[p.13]

minutes they are entitled to that protection. This child was not granted that protection. By the fact issue was just a few days of being or not, there was no investigation. And the cases that have reviewed the statute that the State looked at in Wagoneer, which are reverenced in the motion for new trial, they indicated that the offense of prostitution doesn't even have to be committed in order for there to have been compelling prostitution.

But this case this child did agree to sex for $50, so they know that the offense or the allegation of

prostitution was there, but nobody questioned why. And the minute somebody comes into the system under the age of 17 with the red flag of being a runaway, with the red flag of living with an adult that she doesn't want to disclose, it is the State's responsibility to follow up and ask those questions, why, before tagging her with a label of a prostitute. That is violation of due process.

MS. ALLEN: However, Your Honor, the State would not have been allowed to speak with her, would not have been allowed to do the investigation, would not have been allowed to do anything because she was represented by counsel and no lawyer asked us to speak to her, therefore, we could not have spoken with her. I could

[p.14]

not have sent a police officer there and said whatever to investigate because she has the Sixth Amendment right to counsel. She was represented by a competent lawyer. That lawyer did not ask us to investigate anything. The State should not be held to that standard.

MS. JOHNSON: Your Honor, again our response is it's not her obligation to do it. It's not the Respondent's burden. It's not an affirmative defense. It is an obligation by the State and I would again object because in this case this issue was raised to the State to make them aware and nothing happened, not while we couldn't so we didn't. Nothing happened. No investigation was done. No question about it.

THE COURT: I understand your concern. I don't see any legal basis to grant a new trial. Although it sounds like she's certainly indigent, I have no problem appointing her an attorney for appellate purposes. I don't see a conflict since you were not there at trial with you being the appellate counsel if you feel.

MS. JOHNSON: Yes, Your Honor, I would ask to be appointed as the attorney and ask that the Court make a docket entry that permission to appeal is granted.

THE COURT: I will do that.

[p.15]

MS. JOHNSON: Thank you, Your Honor.

(Adjourned)

[p.16]

THE STATE OF TEXAS
COUNTY OF HARRIS

I, Eliza Madrigal, Official Court Reporter in and for the 315th District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $ 154.00 and was paid by Harris Co. .

WITNESS my hand this the 20th day of January, A.D., 2008.

/s/ _____
ELIZA MADRIGAL, Texas CSR #6073
Official Court Reporter
315th District Court
1200 Congress Avenue, 7th Floor
Houston, Texas 77002
(713) 222-4950
Certification Expires: 12-31-08

APPENDIX D

IN THE 315 TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

2007-08059J Delinquency

[Filed October 2, 2007]

IN THE MATTER OF)
B. D. S. D.)
AKA:)
_____)

Date of Judgment: 10/2/2007
Date of Disposition: 10/2/2007
Probation Beginning: 10/2/2007
Probation Ending: 10/1/2008
Respondent's Date of Birth: 10/7/1990
Date of Offense: 9/13/2007

JUDGMENT/ORDER

STIPULATION TO THE EVIDENCE; or
NOLO CONTENDERE; and BEFORE COURT-
WAIVER OF JURY TRIAL

Attorney for State: C. M. ALLEN

Attorney for Respondent: O A K E S , N A T A L I A
COKINOS

Adjudicated Offense:

PROSTITUTION- GENERAL Any other counts, if any, are hereby nonsuited.

* * *

☑ Misdemeanor B

* * *

Affirmative Findings

☑ Child found to have engaged in Delinquent Conduct

* * *

☑ Child in Need of Rehabilitation

* * *

☑ Respondent is a child under the meaning of Title III of the Texas Family Code. Disposition should be made for the child's protection and for the protection of the public. Disposition is in the best interest of said child's health, safety, morals and education.

* * *

☑ The Court finds that the best interest of the child and of the community will be served by removing the child from his/her home as referenced in Exhibit A incorporated herein, and the Court finds that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible to return home as referenced in Exhibit B incorporated herein. The court finds that the child, in the child's home) cannot be provided the

quality of care and level of support and supervision that the child needs to meet the conditions of probation. IT IS FURTHER ORDERED that the child be removed from his/her home and the Court approves the removal. The Court further finds that the Harris County Juvenile Probation Department is responsible for child's care and placement.

Disposition and Placement:

* * *

☑ Custody to CJPO

* * *

Name of Court Ordered Parent(s), Guardian(s), or Custodian(s) here:

Court Costs to be paid through: Harris County District Clerk, P.O. Box 4651, Houston Tx 77210-4651.

Court Costs funds shall be deposited into the Harris County General Fund

Court Costs Payee: WAIVED - Due to Inability to Pay

The following person(s) shall be responsible for full payment:

Supervisory Fees to be paid through: Harris County District Clerk, P.O. Box 4651, Houston Tx 77210-4651.

Supervisory Fees shall be deposited into the Harris County General Fund

Supervisory Fees Payee: WAIVED - Due to Inability to Pay

The following person(s) shall be responsible for full payment:

[p.2]

Community Service - Number of hours and terms:

15 HOURS

Attorney Fees Assessed to be paid through: Harris County District Clerk, P.O. Box 4651, Houston Tx 77210-4651.

Attorney Fees shall be deposited into the Harris County General Fund

Attorney Fees Payee: WAIVED - Due to Inability to Pay

The following person(s) shall be responsible for full payment:

* * *

Texas Drivers license Restrictions: No Driver License Restrictions

☑ The respondent's thumbprint is affixed to this order, in compliance with Section 54.04 (j) of the Texas Family Code.

(Thumbprint is attached and made a part of this order thereof)

Respondent is ordered to participate in the following programs:

* * *

☑ GED Program

* * *

Special Instructions: DECISION MAKING WORKSHOP, ATTEND SCHOOL DAILY.

* * *

☑ Any other rules set by HCJPD

* * *

Rules of Probation:

R1. I will report to my Juvenile Probation Officer, as requested, and will report any change of address, school or employment within three days.
R2. I will attend my home school or another accredited school (all classes) every day, unless I have an excused absence, OR, if legally excused from school, will work full time each day. I will report within 24 hours every absence from school to my Juvenile Probation Officer.
R3. I will remain within the limits of Harris County and will leave the County only with my Juvenile Probation officer's permission

[p.3]

or when in the company of my parent(s) or guardian.
R4. I will not violate any law of the State or those of any place I may be located.
R5. I will not leave my Court Placement without lawful permission, and I will obey all the rules of my placement.
R6. I will be in my Court Placement each evening by 7;00 PM from Sunday through Thursday and by 7:00 PM on Friday and Saturday (to remain until 6:00 A.M. each day following), unless I have specific permission from my Juvenile Probation Officer or am with my parent/guardian.
R7. I will attend and participate in any program required by my Juvenile Probation Officer.
R8. I will submit myself to random urine specimen analysis at a location and time specified by personnel of Harris County Juvenile Probation, reveal to said authorized personnel proof of any medication legally prescribed for me prior to submitting specimen. A urine positive for any controlled substances, dangerous drugs, or marijuana, not legally prescribed for me may result in adjudication of delinquent conduct or revocation of probation.
R9. I will report to my Juvenile Probation Officer within 24 hours, any citations received to appear before a Justice of the Peace or Municipal Court.

BE IT REMEMBERED that this cause being called for trial, came on to be heard before the above court with the above numbered and entitled cause and came the Sate of Texas by her Assistant District Attorney and came in person the Respondent with his/her defense

attorney, and the Respondent's parent(s), guardian(s), or custodian(s) and all parties waived a jury and announced ready for a hearing; and there upon the Court, after hearing the pleading of all the parties and hearing the evidence and argument of counsel, finds beyond a reasonable doubt, that said child committed the offense(s) alleged in the petition and/or established by the evidence

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the respondent engaged in delinquent conduct or is a child in need of supervision (consistent with the affirmative findings above).

IT IS FURTHER ORDERED, that said child is hereby placed in the custody of said parent(s), guardian(s), or custodian(s), as indicated above, who will be responsible for the child's care and placement, under the rules of probation (if indicated above) for the period indicated above, but not to or beyond the child's 18th birthday, and as listed on the page attached hereto and which is made a part of this order hereof, subject to further orders of the Court.

THE CHILD WAS NOTIFIED, of his/her right to appeal in accordance with Chapter 54.04(h)(1) and as required by section 56.01(n) of the Texas Family Code. Further, the child was notified of his/her right to seal his/her records in accordance with chapter 54.04(h)(2), under the procedures for sealing records in Section 58.003 of the. Texas Family Code.

Recommended and Signed on this the

____ day of _____20,__

_____
Associate Judge/Master 315th District Court
Harris County, Texas

Approved and Signed on this the

____ day of __Oct-2 2007_____20,__

/s/_____
Judge, 315th District Court
Harris County, Texas

/s/_____
Signature of Respondent

Juvenile's Right Thumb print

/s/_____
Print obtained by

IN THE 315TH DISTRICT COURT
HARRIS COUNTY
STATE OF TEXAS

IN THE MATTER OF S. B. NO: 200708059J

Exhibit B

The court finds that the following efforts were considered in determining whether reasonable efforts have been made to prevent or eliminate the need for the child to be removed from (his or her) home:

* * *

X The nature of the offense and/or circumstances in the child's home necessitates removal of the child from the home.

* * *

APPENDIX E

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS [POST
Post Office Box 12248 MARK]
Austin, Texas 78711-2248

RE: Case No. 09-0659 DATE: 2/12/2010
COA #: 14-07-01079-cv JC# : 2007-08059J

STYLE: IN THE MATTER OF B. D. S. D.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice Guzman not sitting)

MAIL TO:

MR. MICHAEL A. CHOYKE
WRIGHT BROWN & CLOSE LLP
THREE RIVERWAY SUITE 600
HOUSTON TX 77056

APPENDIX F

[SEAL] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS [POST
Post Office Box 12248 MARK]
Austin, Texas 78711-2248

RE: Case No. 09-0659 DATE: 5/7/2010
COA #: 14-07-01079-cv JC# : 2007-08059J

STYLE: IN THE MATTER OF B. D. S. D.

Today the Supreme Court of Texas denied the petition for rehearing of the above-referenced case.

MAIL TO:

MR. MICHAEL A. CHOYKE
WRIGHT BROWN & CLOSE LLP
THREE RIVERWAY SUITE 600
HOUSTON TX 77056

APPENDIX G

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
315TH JUDICIAL DISTRICT

PETITION NO. 2007-08059J

[Filed November 20, 2007]

IN THE MATTER OF	)
	)
B D S	)
	)
RESPONDENT	)
	)

RESPONDENT'S AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW B D S, "Respondent," in the above-numbered and entitled cause and files this her Motion for New Trial. Respondent seeks to withdraw her plea of "true" and have a new trial; or, alternatively, Respondent seeks the Court's permission to appeal her adjudication as a delinquent based on a charge of prostitution on the Constitutional grounds of absurd result and denial of due process.

In support, Respondent respectfully shows the Court the following:

I. FACTS

Respondent was adjudicated on October 2, 2007, for a charge of prostitution following an undercover investigation. Prior to the plea, at Respondent's detention hearing, the State was informed of evidence which might make her immune from prosecution.

On September 14, 2007, Counsel appeared in the detention court on behalf of Respondent. The offense occurring September 13, 2007, and the adjudication following on October 2, 2007. During the initial detention hearing, counsel spoke in open court to the Presiding Judge, the Honorable Beverly Malazzo, and the State's attorney, bringing to their attention, outside the presence of Respondent, legal arguments based on sections 43.05 and 43.06 of the Texas Penal Code.

Counsel referenced the known information about Respondent, the applicable sections of the Penal Code and the position that the State has a responsibility to investigate any person who compelled the prostitution. The report indicates Respondent was a runaway and admitted living with an adult male whom she did not want to disclose his name. These issues were raised despite the fact, immunity from prosecution by identifying a compeller is not an affirmative defense that puts the burden on the Respondent.

Instead, Respondent was adjudicated October 2, 2007, and placed in the Custody of the Chief Juvenile Probation Officer. This Counsel did not represent Respondent at her trial; but the trial judge appointed this Counsel for purposes of filing this Motion for New Trial. Additionally, all Court Records of the Detention

Hearing were destroyed by the Court based on common practice in the Detention Court, when the case was adjudicated.

II. OBJECTIONS TO THE ENTRY OF JUDGMENT AND REQUEST FOR NEW TRIAL

Respondent objects to entry of Judgment as a Delinquent and seeks a new trial on the grounds that an adjudication of prostitution as it applies to this minor should be set aside because it leads to an absurd result and denial of due process.

III. STANDARD FOR A MOTION FOR NEW TRIAL

Juvenile proceedings are "governed by an unlikely and sometimes perplexing hybrid of civil and criminal law." *State v. C.J.F.*, 183 S.W.3d 841, 847 Tex.App.—Houston [1 Dist.], 2005, pet. denied). An appeal from an order of a juvenile court is governed by the requirements pertaining to civil cases generally. *Id.*[1] A juvenile-delinquency proceeding is considered a civil proceeding, but is quasi-criminal in nature. *Id.* When a gap exists between the hybrid nature of these proceedings, juveniles should be afforded the same rights as an adult criminal defendant. See generally *In re E.Q.*, 839 S.W.2d 144, 146-47 (Tex.App. —Austin 1992, no writ) (recognizing juvenile's right to withdraw his plea of "true" where in that case the plea was not

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[1] Tex.Fam.Code Ann. § 56.01 (Vernon 2006) (A motion for new trial seeking to vacate an adjudication is timely if the motion is filed not later than the 30th day after the date on which the disposition order is signed.)

made knowingly, voluntarily and intelligently and a new trial be granted.)

The Court has intrinsic power to grant a new trial in the interest of justice. *State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex.Crim.App.1993) (citing *Reyes v. State*, 849 S.W.2d 812, 815 (Tex.Crim.App.1993) (recognizing the trial court may grant a motion for new trial in the interest of justice even though the grounds for granting a new trial are not specifically enumerated in rule 21.3 of the Texas Rules of Appellate Procedure.)

In this case, a new trial promotes the interest of justice by protecting the juvenile Respondent from the label of a "Prostitute" as a result of an agreement of a sexual act with an undercover officer, an act which the Legislature has specifically mandated that she cannot commit and may be immune from prosecution under this circumstance.

1. Absurd Result

Respondent urges the court that prosecuting a child as a prostitute reaches an absurd result. Prosecuting a child as a prostitute threatens the legitimacy of confirmed Texas laws that protect children from sexual exploitation. The Texas Legislature could not have intended, with a blanket adoption of the Texas Penal Code to juveniles, that children, whose consent to sex with an adult has no legal effect, can face criminal charges for the act they are protected from committing with an adult. In this case, the State prosecuted Respondent for prostitution despite mandates that children are not legally responsible for consenting to sex with adults. When, as here, application of the plain meaning of a statute leads to

an absurd result, the Texas Court of Criminal Appeals applies the examination of extra-textual factors to discern legislative intent. *May v. State*, 919 S.W.2d 422, 423 (Tex. Crim. App. 1996) (citing *Boykin*, 818 S.W.2d at 785-86). The Courts look to legislative intent where it is known and, here, at least three confirmed sections of the Texas Penal Code 22.021 (Aggravated Sexual Assault), 43.05 (Compelling Prostitution) and 43.06 (Immunity) show an intent to protect children from sexual exploitation and prosecution. *See* Tex. Penal Code §§ 22.021, 43.05 and 43.06 (Vernon 2006).

Specifically, section 43.05 of the Texas Penal Code provides that if anyone under 17 has been caused *by any means* to commit prostitution, then under section 43.06 the child is immune from prosecution. The Texas legislative focus is on protecting the child, who may be subjected to prostitution, from the adults who exploit them. It is absurd to suggest that Respondent must carry the stigma of an adjudication based on a charge of prostitution simply because the State failed to investigate evidence, which may have provided her immunity from prosecution if she was caused by any means to commit the act.

Applying Respondent's agreement to sex against her not only directly contradicts the language and intent of these other protective statutes in the same chapter and section of the Code; but, it weakens them. It does not make sense for the State to claim, under the Texas Penal Code, that a child's consent to sex, under section 43.02, *has legal effect*, but a child's consent to sex, under 22.021 and 43.05, *has no legal effect*. *See* Tex. Penal Code §§ 43.02, 22.021 and 43.05 (Vernon 2006) (emphasis added). These conflicting applications of the same sections of the statutes cannot

be harmonized to give effect to all of them. *See Borden, Inc. v. Sharp*, 888 S.W.2d 614 (Tex. App. –Austin 1994, writ denied) (reversing when: "We fail to see how the two statutes can be harmonized so as to give effect to both"; recognizing conflicting requirements in the tax code as applied literally could not have been intended by the legislature.)

When the State's prosecution of a child for prostitution cannot be harmonized with well-established statutes that the legislature created, and that the courts have enforced, to protect children, the court should yield to the established statutory language of sections 22.021 and 43.05 of the Texas Penal Code. (Vernon 2006). It is appropriate for this court to (1) grant new trial on the adjudication based on the prostitution charge; or (2) grant permission to appeal the case on the Constitutional grounds of absurd result, denial of due process, or on public policy grounds.

2. Due Process

The cumulative failures of the State to investigate the reported facts and protect Respondent, while labeling her a prostitute, denied Respondent due process.

Respondent's prosecution as a minor for prostitution denied her due process under both the United States and Texas Constitutions. First, under Texas law, Respondent is immune from prosecution based on testimony given as to why and against whoever may have caused her by any means to commit prostitution. Tex. Penal Code § 43.05 (Vernon 2006). Secondly, the State imposes a stigma on Respondent

as an adjudicated prostitute, despite her legal inability to consent to the very elements the State used to give her that label. *See generally Hindman v. State*, 211 S.W.2d 182 (Tex.Crim.App. 1948) (recognizing the offense of statutory rape is complete with or without consent). The United States Supreme Court has written: "Neither man nor child can be allowed to stand condemned by methods, which flout constitutional due process rights of law." *Haley v. Ohio*, 332 U.S. 596, 601 (1948).

The State has notice of the voluminous literature on the issue of runaway children and their sexual exploitation. The National Center for Missing and Exploited Children ("N.C.M.E.C.")[2] in conjunction with the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention ("D.O.J."), in a published study in 1999 regarding the issue of Juvenile Prostitution, found: "[p]rostitution of children is closely tied to life on the streets;" and that: "[a]ccording to one US Department of Health and Human Services report, up to 300,000 prostituted children may live on the streets." Eva J. Klain, J.D., "*Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*," National Center for Missing & Exploited Children (April 1999) ("Prostitution of Children"), at 2.[3]

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[2] The cited N.C.M.E.C. publications are available at www.missingkids.com. They are in the "Featured Publications" section of the "Sexual Exploitation" link in the "Topics of Focus" section found on the home page. The page and links were last visited on October 3, 2007.

[3] Klain is with the American Bar Association's Center on Children and the Law.

Many of those "[r]unaway children often engage in what some experts refer to as 'survival sex,' the performance of sexual acts in return for food or shelter." *See* Paul Menair, *Review of Selected 2001 Georgia Legislation*, 18 *Ga. St. U. L. Rev.* 32, 37,[4] (Fall 2001) (citing Jane O. Hansen, "*Runaway Girls Lured Into the Sex Trade Are Being Jailed for Crimes While Their Adult Pimps Go Free*," *ATLANTA J. CONST.*, Jan. 7, 2001, at A1).

Because the State failed to investigate, how Respondent began prostituting remains unanswered. But, as one author noted:

> Even if children first begin to prostitute for money to survive, once in prostitution they may find themselves working to support a pimp rather than themselves. Young girls are especially vulnerable to pimps who befriend them and shower them with the attention and affection (although feigned) that they did not receive at home.

"*Prostitution of Children*," at 2. Additionally, a runaway child may be the target of a pimp: "If she is a

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[4] Quoting Georgia's Legislative History in 2001 when it made pimping a felony recognizing "'children are increasingly induced, coerced, or compelled to perform sexual acts for the financial benefit of third parties' and to 'express abhorrence for these practices and . . . better protect children from sexual exploitation.'" *Id.* at 44, see Georgia House of Representatives Voting Record, *SB 33* (Mar. 14, 2001), *available at* http://www.legis.State.ga.us/Legis/2001_02/votes/sv0092.htm. Texas passed its felony charge against those that sexually exploit children in 1973. *See* Tex. Penal Code § 43.05 (Vernon 2006).

runaway he will offer her food and shelter and vaguely hint at the possibility of a job." National Center for Missing and Exploited Children, "*Female Juvenile Prostitution: Problem and Response*," Office of Juvenile Justice and Delinquency Prevention and Office for Victims of Crime (Second Ed., November 2002) ("Female Juvenile Prostitution") at 1. The N.C.M.E.C. and D.O.J. "in recognition of the need to help these young victims of exploitation" highlighted studies of juvenile prostitutes and their pimps in 2002. *Id.* at vii – viii. They recognized:

> An interesting observation is the relationship of the juvenile to the pimp. The pimp is cast into the role of benefactor/boyfriend with the juvenile having a difficult time acknowledging that he is a pimp. ... [__] she was aided by the positive attention of the pimp or his efforts to protect her.

Id. at 14. Pimps "look for young girls who are lonely or rebellious, with low self esteem" and "prey disproportionately on young runaway" girls. "*Prostitution of Children*," at 4. (citations omitted).

> The pimp may then initiate a sexual relationship with the girl, continuing to become the primary person in her life. This pretense of love lulls the girl into thinking theirs is a mutually developing relationship, making her emotionally and psychologically dependent on the pimp as a substitute for the family that abused her or turned her away.

Id. at 4 (citations omitted). "Soon she finds herself prostituting as a condition of her love for him. The

young girl, however, continues to think of the pimp as her boyfriend, and this perception of the relationship sustains the control and abuse." *Id.* at 5. One of the N.C.M.E.C. and D.O.J. studies also found that "[g]eneral psychological and emotional problems, housing instability, substance abuse, educational and vocational failure, and major problems at home have all been cited as common precipitating factors in the lives of prostituted children." *Id.* at 3.

Both the National Center for Missing and Exploited Children and the United States Department of Justice call for bringing sexually exploited children like Respondent into the system; however, not for purposes of prosecution of the child but "*to successfully prosecute pimps and others for violations such as pandering, soliciting, or promoting prostitution.*" Eva J. Klain, J.D., "*Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*," National Center for Missing & Exploited Children (April 1999) ("Prostitution of Children"), at 9-10.[5] (emphasis added). Respondent's conduct should have brought her to the attention of authorities; and, given the nature of the conduct, the State should have protected Respondent within the juvenile justice system; and investigated and imposed the criminal sanctions, if any, against any alleged exploiter.

Not only is this position supported by the N.C.M.E.C. and the D.O.J., the Texas Legislature got this right in 1973 when it issued the mandate to law enforcement and the juvenile justice system to protect

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[5] Klain is with the American Bar Association's Center on Children and the Law.

and not prosecute Respondent, when it codified the Texas Penal Code. Section 43.05, makes pimping a second degree felony. Tex. Penal Code § 43.05(b) (Vernon 2006). Under section 43.05, the State has a duty to investigate whoever causes by any means a child to commit prostitution.[6] *See also Waggoner v. State*, 897 S.W.2d 510 (Tex.App.—Austin 1995, no pet.)

The Legislature's mandate of a second degree felony, with immunity for the child witness, illustrates the legislature's clear intent to protect the child as the victim of sexual exploitation. *See* Tex. Penal Code §§ 43.05, 43.06 (Vernon 2006). Further, the second degree felony 2 to 20-year punishment range shows the legislative focus to remove the one who causes anyone under 17 to commit prostitution from the streets. *See* Tex. Penal Code §§ 12.33, 43.05 (Vernon 2006). Taking the child off the streets, without any consequence to whoever may have caused her by any means to commit prostitution, merely creates a vacuum in which the compeller finds another child to fill the void.

While supervision and treatment is appropriate for Respondent, the State cannot claim that the end result of placement justifies any means to reach that result. Here, the State directly violated *Winship*, where the United States Supreme Court recognized that "juveniles may be engaging in a general course of

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[6] The burden to pursue the exploiter cannot be shifted to the child. Protecting children from sexual exploitation under either sections 22.021 and/or 43.05 are mandates to the State. *See* Tex. Penal Code §§ 22.021 and 43.05 (Vernon 2006). There are no affirmative defenses listed. *See generally* Tex. Penal Code §§ 22.021, 43.05, 43.06 (Vernon 2006); *see also* Tex. Penal Code § 2.04 (Vernon 2006)("an affirmative defense in this code is so labeled ...").

conduct inimical to [their] welfare that calls for judicial intervention." *In re Winship*, 90 S.Ct. 1068, 1074 (1970) ("[T]he Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.' ") Yet, the Supreme Court mandated "the intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law...." *Id.* Also, the Court wrote, "good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts" *Id.* The cumulative failures of the State to investigate and protect Respondent and in stigmatizing her as a prostitute violates due process.

Respectfully submitted,

/s/Ann E. Johnson
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CERTIFICATE OF SERVICE

A true and correct copy of the above document has been delivered to: [Handwritten: A.D.A. Kurt Hophe in court for Kari Allen]

Kari Allen
Assistant District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002

Counsel for the State of Texas

/s/Ann E. Johnson
ANN E. JOHNSON

DATE: November 20, 2007

Notice of Hearing

The above motion is set for hearing on December 11, 2007, at 9:00 a.m. in the 313th Judicial District Court of Harris County, Texas.

SIGNED on _____, 2007.

_____
Judge or Clerk